Supreme Court of the United States

OCTOBER TERM, 1945

No. 72

DOROTHY NIPPERT,
Apellant,

vs.

CITY OF RICHMOND.
Apellee.

Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR APPELLANT

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I.

THE OPINION OF THE COURT BELOW

The Opinion of the Supreme Court of Appeals of Virginia (R. 17) is reported in 183 Virginia, Page 689.

II.

JURISDICTION

1. The decision and judgment of the Supreme Court of Appeals of Virginia, sustaining the validity of the ordinance of the City of Richmond, which required the appellant to obtain a permit from the Director of Public Safety and to obtain a license before she would be per-

mitted to solicit orders in interstate commerce, overrules, and is in direct conflict with, every case which has been decided by the Supreme Court of the United States on this specific point.

2. The decision of the Supreme Court of Appeals of Virginia, affirming the judgment of the Hustings Court, holds that an ordinance of the City of Richmond which leaves to the discretion of its Director of Public Safety whether a permit for a license shall be issued, does not violate appellant's constitutional rights.

3. The decision of the Supreme Court of Appeals of Virginia expressly permits the City of Richmond to require of the appellant that she obtain a permit from the Director of Safety of the City of Richmond before applying for a license to solicit, and also required her to pay $50.00 for a license in order to solicit orders for goods to be shipped in interstate commerce. To permit the City of Richmond to place in the hands of any officer of that City the power to pass upon whether a permit should be issued to any individual for the purpose of obtaining a license, would, in effect, give to that officer the power to control or suppress the privilege of even obtaining the license to solicit for the sale of goods in interstate commerce.

4. The statutory provision believed to sustain the jurisdiction of this Court is section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C., secs. 344 (a), 861 a).

III.

STATEMENT OF THE CASE

The appellant was arrested in the City of Richmond, Virginia on the 20th day of January, 1944 and charged with unlawfully engaging in the business of soliciting orders in the City of Richmond without having procured

a city license assessible under Section 23 of Chapter 10 of the Richmond City Code of 1937 and your petitioner was brought into the Police Court of the City of Richmond on the 22nd day of January, 1944 and was fined $25.00 and costs and ordered to purchase a city license as provided by Section 23, Chapter 10 of the Richmond City Code of 1937. (R. 11).

In the hearing before the Police Court Justice evidence was presented that the appellant was in charge of a sales force soliciting orders for a ladies' garment manufactured by the American Garment Co. which was owned and operated by John V. Rosser in Washington, D. C. and that when orders were solicited for this garment a certain down payment was taken from the purchaser, which in most instances covered the commission of the solicitor, and the order was forwarded to Washington where it was filled and forwarded C. O. D. by the American Garment Co. through the United States mails to the purchaser and it was contended in the Police Court that the ordinance, insofar as it referred to the appellant, requiring that she obtain a permit, was in conflict with the commerce clause of the Federal Constitution.

An appeal was noted from the judgment of the Police Court to the Hustings Court of the City of Richmond where a trial de novo was had and the same question was presented to the Hustings Court, that is, that the ordinance, insofar as it referred to appellant, was in conflict with the commerce clause of the Federal Constitution.

The Hustings Court found appellant guilty of unlawfully engaging in Richmond in the business of a solicitor without having procured a city license assessible under Section 23 of Chapter 10 of the Richmond City Code and fined appellant $5.00 and costs. (R. 12)

A petition for a writ of error to the Hustings Court of the City of Richmond was filed in the Supreme Court

of Appeals of Virginia and the dominant assignment of error was that the ordinance of the City of Richmond was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution and a writ of error was granted and the Supreme Court of Appeals of Virginia affirmed the decision of the Hustings Court holding that the license required under Section 23, Chapter 10 of the Richmond City Code of 1937 did not violate appellant's constitutional rights. (R. 17)

IV.

SPECIFICATION OF ERRORS

1. The Supreme Court of Appeals of Virginia erred in refusing to hold that the ordinance of the City of Richmond, insofar as it referred to appellant, was in conflict with appellant's rights under Article 1, Section 8, Clause 3 of the Constitution of the United States.

2. The Supreme Court of Appeals of Virginia erred in affirming the decision of the Hustings Court that appellant was guilty of violating the ordinance of the City of Richmond in soliciting orders in interstate commerce without having first procured a permit from the Director of Public Safety and a city license as a solicitor.

V.

SUMMARY OF ARGUMENT

1. The license tax imposed by the ordinance of the City of Richmond is a flat license tax and the requirement of the payment of this tax as a condition of the exercise of the privilege of soliciting orders for the sale of goods in interstate commerce is a direct burden upon interstate commerce and violates appellant's rights under the Constitution of the United States.

2. The requirement of the ordinance of the City of Richmond, that a permit from the Director of Public Safety

be obtained before a license will be issued, gives to the Director the discretion as to whether a permit should be issued and would in effect give to that officer the power to control or suppress the privilege of soliciting orders in interstate commerce and is a direct burden on interstate commerce and violates appellant's rights under the Constitution of the United States.

VI.

ARGUMENT

The record in this case clearly presents to this Court for its decision the question as to whether or not a solicitor, having no fixed place of business, and soliciting orders for a foreign firm can be required by the City of Richmond to submit herself to the discretion of an official of that City, first as to whether or not she is entitled to a permit and secondly, if a permit is issued, to pay $50.00 for a license for the privilege of soliciting such orders in interstate commerce.

The ordinance of the City of Richmond which is material to a decision of this case is as follows:

> "Chapter 10, Section 4.—There shall be levied and collected for the calendar year 1931 and each calender year thereafter, the following license taxes, to-wit: (December 24, 1930)
>
> "Chapter 10. Section 23.—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors . . . $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933.)
>
> "Chapter 10, Section 166½—Permits of Director of Public Safety Required for Certain Licenses.—(a) Every person, firm and corporation desiring a license

under sections 14, 16, 23, 94, 120 and 143, of this chapter shall first apply to the Director of Public Safety for a permit on behalf of said individual, firm or corporation, as the case may be, to conduct the business which is desired to be conducted and shall produce to that Director evidence of the good character of the individual, the members of the firm, or the chief officers of the corporation, as the case may be, and it shall thereupon be the duty of the Director of Public Safety to make a reasonable investigation of the character of said individual, each of the members of the firm, or each of the chief officers of the corporation, as the case may be, and if he be satisfied that the individual, the members of the firm or the principal officers of the Corporation, as the case may be, be of good moral character and a person or persons fit to engage in the proposed business, he shall issue the permit. The form of the application for such permit and the form of the permit itself shall be prepared and furnished by the Director of Public Safety." (R. 13, 14)

It has been contended by the appellant that the above quoted ordinance, insofar as it affects appellant's rights to solicit orders in interstate commerce, is in conflict with Article 1, Section 8, Clause 3 of the United States Constitution which reads:

> "The Congress shall have power ***to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

This particular question has been presented to this Court on numerous occasions and it has been held at all times that the City could not require such a license for the privilege of soliciting orders.

In the case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, Robbins was found guilty of soliciting without having first obtained a license as required by the Statute in force in Shelby Taxing District, which contained, among other things, the following:

"All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months."

Robbins was soliciting orders for the firm of "Rose, Robbins & Co." of Cincinnati, and Robbins contended that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several states.

The Court, among other things, commencing at Page 496, stated as follows:

"But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country

> are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

and then again, commencing on Page 497, is the following:

> "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone."

and then again at Page 498 is the following:

> "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation.

"To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the state is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce."

The Robbins case has been referred to time and time again throughout the various cases in this Court and the decision of that case has never been reversed.

In the recent case of *McGoldrick* v. *Berwind-White Coal Mining Co.* 309 U. S. 33, 60 S. Ct. Re. 388, the Court at page 55 made the following reference to the Robbins case:

"It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following Robbins v. Shelby County Taxing District, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See Robbins v. Shelby County Taxing District, supra, 120 U. S. page 498, 7 S. Ct. page 596, 30 L. Ed. 694; Caldwell v. North Carolina, 187 U. S. 622, 632, 23 S. Ct. 229, 233, 47 L. Ed. 336. In all, the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances may, by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 625, 54 S. Ct. 542, 545,

78 L. Ed. 1025, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare Hammand Packing Co. v. Montana, 233 U. S. 331, 34 S. Ct. 596, 58 L. Ed. 985, Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109, with Schollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49; Robbins v. Shelby County Taxing District, supra; Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45. It is enough for present purposes that the rule of Robbins v. Shelby County Taxing District, supra, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

It is evident from the foregoing statement that the requirement of a fixed sum license tax which is imposed upon the privilege of soliciting orders in interstate commerce is unconstitutional. No question is being raised in this case on the right of the City of Richmond or the State of Virginia to place a tax upon the income derived from the business but merely the taxing of the privilege of engaging in the business.

In the case of *Brennan* v. *Titusville*, 153 U. S. 289, one J. W. Brennan was engaged as an agent to solicit orders for pictures and frames manufactured by J. A. Shephard in Chicago and Brennan was convicted in the City of Titusville, Pa. for an ordinance of that city requiring all persons canvassing or soliciting within the said City to pay certain sums of money for a license to solicit, the amount being dependent upon the length of time the solicitor desired to remain in the City and Brennan was sentenced to pay the sum of $25.00 and costs.

The Court at page 302 made the following statement:

"That this license tax is a direct burden on interstate commerce is not open to question."

And again at page 303 the Court made this observation:

> "In Leloup v. Mobile, 127 U. S. 640, 645, are these words from Mr. Justice Bradley:
>
> 'Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business.' "

The Court then in referring to the tax required under the ordinance of the City of Titusville at page 303 stated as follows:

> "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

The agreed statement of facts in this case (R. 13-16) is almost verbatim with the facts that were presented to this Court for decision in the case of *Real Silk Hosiery Mills, Inc.*, v. *City of Portland*, 268 U. S. 325, in which case the facts disclose that the Real Silk Hosiery Mills, Inc., was an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis, Indiana, and selling it throughout the United States to consumers only. It employed two thousand representatives who solicit orders in most of the important cities and towns throughout the United States. The City of Portland passed an ordinance which required that every person who goes from place to place taking orders for goods for future delivery and receives payment or any deposit of money in advance shall secure a license and file a bond.

The appellant filed a bill in the United States District Court for Oregon challenging the ordinance and asking that its enforcement be restrained upon the ground, among others, that it interfered with and burdens interstate commerce and was repugnant to Article 1. Section 8 of the Federal Constitution. The Trial Court upheld the enactment and sustained a motion to dismiss the bill. This was affirmed by the Circuit Court of Appeals.

The Court, at Page 335, said:

> "Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 497.***
>
> "The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.' Manifestly, no license fee could have been required of appellant's solicitors if they had travelled at its expense and received their compensation by direct remittances from it. And we are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189.
>
> "The decree of the court below must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion."

All the foregoing cases clearly indicate that any burden or control on interstate commerce must come from the Congress of the United States which has the sole power to regulate commerce among the various states and that

any ordinance which attempts or in anywise interferes with the privilege of engaging in interstate commerce is unconstitutional and void. It has been the apparent view of the officials of the Commonwealth of Virginia and the City of Richmond that a solicitor would not be required to obtain a license either in Richmond or the State of Virginia and this view is well set forth in the brief on behalf of the Commonwealth of Virginia and the City of Richmond in the matter of the petition for a writ of certiorari filed in this Court by the *Christian Corp.* v. *The Commonwealth of Virginia and the City of Richmond* No. 812 October Term 1941 and in respondent's brief at page 7 is the following:

> "But a State license as a commission merchant is only required where such merchant has established a definite place of business, section 131 of the Tax Code of Virginia (Acts of Assembly 1928, p. 97) providing that 'every license granting authority to engage in ***any business*** shall designate the place of such business*** at some specified house or other definite place within the county or city***.' There is no State license required of an itinerant solicitor of orders in a city or town with no place of business therein (such as a drummer) and consequently section 296 of the Tax Code does not afford any authority for the assessment of a local license in such a case."

This case contains more than the question covering a flat license tax for before it is possible even to obtain a license, it is necessary that certain information be given to the Director of Public Safety of the City of Richmond and that official passes upon the question as to whether or not the person who is to solicit, or the firm for which she sells, are proper parties to obtain a permit to obtain a license and it gives to that individual, in effect, the right to grant or refuse, even with the payment of a flat license tax, the privilege of soliciting orders in interstate commerce. While the questions raised in this case had nothing to do with

the first amendment to the Constitution, nevertheless the reasoning in some of the cases covering that amendment have a very direct bearing on this case. In the case of *Murdock* v. *Commonwealth of Pa.*, 319 U. S. 105, 63 S. Ct. Re. 70, the Court at page 112 made the following statement:

> "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Magnano Co. v. Hamilton, 292 U. S. 40, 44, 45, 54 S. Ct. 599, 601, 78 L. Ed. 1109, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.
>
> "It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant if it does not do so. But that is to disregard the nature of this tax. It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick v. Berwind-White Co., 309 U. S. 33, 56-58, 60 S. Ct. 388, 397, 398, 84 L. Ed. 565, 128 A. L. R. 876), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. Id., 309 U. S. at

page 47, 60 S. Ct. at page 392, 84 L. Ed. 565, 128 A.L.R. 876 and cases cited. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."

The question covering the application for a permit and the requirements covering the information to be given before a permit is required to be issued by the Director of Safety is very well covered in the case of *Pictorial Review Co.* v. *City of Alexandria*, 46 F (2d) 337 where the Court at page 339 stated as follows:

"There is no question but that the city has the right to protect its citizens from imposition by persons who may violate its police regulations intended for the protection of property, morals, health, and safety, where the nature of the business is inherently dangerous; but it cannot, because of any supposed or real difficulty in controlling the personal conduct of individual agents, not necessary to their employment, impose an unwarranted burden upon an otherwise harmless and legitimate traffic in interstate commerce. The complainant is admittedly engaged in a business involving no element of danger, and restrictions of the kind embraced in this ordinance are a direct interference with that free and full flow of trade between citizens of the several states which is contemplated by the constitutional provision intrusting to Congress the exclusive power to regulate it. If the city can require a permit, it may also impose a license fee of such magnitude as to be prohibitive. The requirement with respect to examination and the giving of bond, coupled with the power in the mayor with the right of appeal to the council to deny altogether the

right any one to act as agent of the complainant, is an unreasonable restriction upon its business which affects directly interstate commerce."

CONCLUSION

It is respectfully submitted that the requirement of the ordinance of the City of Richmond, which required that the appellant submit to the whims of any person as to whether or not she might obtain a permit to obtain a license to solicit orders for goods to be shipped in interstate commerce and also the requirement that she pay a flat license fee of $50.00 for the privilege of soliciting orders for goods to be shipped in interstate commerce, is a burden on interstate commerce and violates appellant's constitutional rights and is void, and that the judgment of the Supreme Court of Appeals of Virginia be reversed.

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